

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

SYLVESTER MCCLAIN, on his own behalf and on behalf of a class of similarly situated persons, et al.,	§ § § §	
vs.	§ §	CIVIL ACTION NO. 9:97-CV-063
LUFKIN INDUSTRIES, INC.,	§ § §	JUDGE CLARK
Defendant.	§	

**DEFENDANT'S COMMENTS ON PLAINTIFFS' STATUS REPORT AND AMENDED
DISTRIBUTION PROPOSAL RE: MONETARY RELIEF**

Reserving its right to appeal any finding of liability with respect to the hourly or salaried employees, or with respect to any of the time periods identified in previous pleadings, as well as any damages flowing from any liability finding that Lufkin might appeal, Lufkin's only comment is that the proposed participation awards still does not address the Court's concern that the amounts greatly exceed what has been found appropriate in other cases. If the participation awards were based on \$500.00 per point, the average participation award would be \$3,045.00, which is more in line with the incentive awards awarded in the cases cited by the Court in the November 6, 2009 hearing.

Lufkin's comments about the amount of the proposed participation awards are also driven by the unique posture of this case. This case is unusual in that it comes to the Court after a full-fledged trial and is not the product of a settlement, which would require notice to all class members as well as an opportunity to object. Fed. R. Civ. Pro. 23(e). While Plaintiffs' counsel states in his Declaration that he discussed the participation awards with co-counsel, class

representatives, and class members,¹ it is unclear whether these discussions involved any class members for whom Plaintiffs are not seeking awards. If the only class members who were consulted regarding these performance awards were those who were going to receive them, then Plaintiffs' request for larger-than-average participation awards deserves further scrutiny for the sake of the remaining class members.

Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

I certify that on this 19th day of November 2009, a copy of the foregoing document was filed electronically through the Court's CM/ECF System and was automatically copied to Plaintiffs through the Court's electronic filing system.

/s/

Attorney for Defendant

¹ Garrigan Declaration at 2.